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No. 86-357

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Appellants

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, et, al.,
Appellees

On Appeal from the Supreme Court of Pennsylvania

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether a state may, consistent with the Commerce Clause, amend its tax laws to redistribute the tax burden between interstate and intrastate commerce in such a way as to increase the relative burden on interstate commerce when the resulting tax distribution still weighs more heavily on intrastate commerce than interstate commerce.

2. Whether this Court should overrule the principle, reaffirmed as recently as 1978, that states may impose reasonable flat taxes on interstate commerce.

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STATEMENT OF THE CASE

In this appeal, appellants, who are interstate motor carriers registered outside of Pennsylvania, challenge two Pennsylvania taxes imposed on trucks, tractor-trailers and combinations which travel in Pennsylvania. Both of those taxes were declared unconstitutional by the trial court, but both were upheld by the Pennsylvania Supreme Court. This appeal followed.

1. The Marker Fee.

From April 1, 1981 through April 1, 1983, Pennsylvania imposed a $25 "Marker Fee" as a charge[1] for obtaining a road tax identification

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[1] This tax was reduced from $25 to $5 by the same legislation, Act 234 of 1982, which created the Axle Tax. J.S. App. 7a.

marker, a decal which out-of-state trucks are required to display in order to identify themselves as being subject to another tax -- the Motor Carriers Road Tax. 75 Pa. Cons. Stat. § 2101, J.S. App. 80a-81a. Trucks registered in Pennsylvania also are subject to the Motor Carriers Road Tax, but need not display the marker decal because their Pennsylvania license plate serves the same purpose. Ibid. For Pennsylvania trucks, the Marker Fee is deemed part of and included in the substantial fee which their owners pay to register in Pennsylvania. When the $25 Marker Fee was first imposed on out-of-state trucks, the registration fees for instate trucks was also raised by substantially more than $25. J.S. App. 7a.

The trial court held that, as a matter of law, the $25 Marker Fee was imposed only on trucks not registered in Pennsylvania, and that the fee therefore discriminated on its face against interstate commerce in violation of the Commerce Clause. J.S. App. 57a. It did not reach the claim that the Marker Fee also was unconstitutional because it was a flat tax not adequately related to the services provided by the Commonwealth.

The Supreme Court of Pennsylvania disagreed and reversed. First, the state Supreme Court found that the trial court had misread Pennsylvania law in determining that the $25 Marker Fee was not included in the registration fees paid by Pennsylvania-registered trucks. J.S. App. 23a. It also found

that, when viewed as a whole, Pennsylvania's tax scheme imposes substantially higher taxes on Pennsylvania-registered vehicles than on those registered elsewhere, and that there was therefore no discrimination against interstate commerce. J.S. App. 24a.

The court then reached and rejected the argument that the $25 fee was not fairly related to the services provided by Pennsylvania. In so doing, it relied on a long line of this Court's decisions upholding flat taxes on interstate commerce and holding that such taxes need not be calibrated exactly to services received by individual users of state facilities, so long as they are not excessive in the aggregate. Applying those principles, the state court held that the Marker Fee tax did not

impose an excessive burden on interstate commerce in light of the substantial highway construction and maintenance, state police services and construction bond debt services which it financed, all of which benefited interstate commerce. J.S. App. 29a.

Here, appellants do not challenge the state court's holding that the $25 Marker Fee was imposed on both interstate and intrastate commerce. They do challenge that court's conclusion that the tax was reasonably related to services provided by Pennsylvania.

2. The Axle Tax.

The Axle Tax is an annual tax of $36 per axle imposed by Pennsylvania on every truck, tractor-trailer and combination which travels in Pennsylvania and has a gross weight in excess of

26,000 pounds. 75 Pa. Cons. Stat. § 9901 et seq., J.S. App. 82a-86a. Refunds are available based on actual mileage traveled for any covered vehicle traveling less than 2,000 miles in Pennsylvania. 75 Pa. Cons. Stat.§ 9905, J.S. App. 83a. Proceeds from the tax are placed in a special account dedicated to bridge rehabilitation and replacement projects. 75 Pa. Cons. Stat. § 9908, J.S. App. 85a.

Act 234 of 1982, the same act which imposed the Axle Tax on all trucks, also lowered registration fees for trucks registered in Pennsylvania, 75 Pa. Cons. Stat. § 9916, J.S. App. 86a-87a, and reduced from $25 to $5 the Marker Fee imposed on out-of-state trucks, J.S. App. 7a. The effect of the lowered registration fee was to offset

approximately the effect of the Axle Tax for most trucks registered in Pennsylvania. However, taken in combination with an increase in the registration fee which had occurred in 1980 (at the same time the $25 marker fee was imposed) the net effect was still an increase for most trucks registered in Pennsylvania.[2]

The state trial court entered summary judgment for the motor carriers

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[2] For example, in 1980, the registration fee for a motor carrier vehicle with a gross or combination weight of 68,001-73,280 pounds increased $228.00. J.S. App. 7a. The 1982 decrease in the registration fee was only $144.00. J.S. App. 9a. Thus, the total registration fee for such vehicles increased $84.00 after 1980. In addition, after 1982, Pennsylvania registered vehicles also paid the Axle Tax -- generally $144.00 (4 Axles x $36) for vehicles in that weight class.

declaring the Axle Tax unconstitutional. The court held that the Axle Tax facially discriminated against interstate commerce because the simultaneous registration fee reductions almost always offset the Axle Tax, virtually exempting Pennsylvania trucks from the Axle Tax. J.S. App. 61a.

The Supreme Court of Pennsylvania reversed, upholding the Axle Tax. It found no discrimination against interstate commerce because, when Pennsylvania's tax scheme was viewed as a whole, intrastate commerce paid substantially higher taxes to Pennsylvania. J.S. App. 33a-34a. The Court also rejected the claim that the Axle Tax is excessive or is not fairly related to the services provided by the Commonwealth. J.S. App. 34a.

THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

Appellants purport to raise two substantial federal questions. First, they claim that the Commerce Clause never permits a state to change its tax structure to increase the relative tax burden on interstate commerce, regardless of the inequities of the old tax structure and regardless of whether the new tax structure weighs too heavily on interstate commerce. Second, they contend that flat taxes invariably discriminate against interstate commerce, because a flat tax imposes a substantially higher tax per mile travelled on trucks registered outside the state than on trucks registered in the state. In fact, neither question is substantial; they have been settled by prior decisions of the Court and do not require its further attention.

1. A State May Redistribute The Tax Burden Between Interstate and Intrastate Commerce In Such A Way As To Increase The Burden On Interstate Commerce.

a. Appellants' first claim is that a state may never redistribute the tax burden between interstate and intrastate commerce.[3] Starting with the principle that charges which apply only to interstate commerce are facially discriminatory and therefore unconstitutional, the appellants conclude that a "manipulation" of the taxing scheme which results in a relative increase in taxes paid by out-of-state users of state facilities is itself facial discrimination. J.S. at 18-19. What this amounts to is that, having once

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[3]This claim relates only to the Axle Tax.

chosen a tax structure and distribution which meets the standards summarized in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), a state is frozen into that scheme forever. This cannot be the case. Complete Auto and this Court's other Commerce Clause decisions allow states greater latitude than that.

This Court has never held that there is only one acceptable distribution of tax burdens between interstate and intrastate commerce. It has only held that, taken as a whole, a state's taxing scheme should not discriminate against interstate commerce by providing intrastate commerce with a competitive advantage, but that interstate commerce may unquestionably be required to "pay its own way." Maryland v. Louisiana, 451 U.S. 725, 754 (1981).

In their first claim, appellants concentrate on the principle that state laws may not discriminate against interstate commerce. Their argument, however, proves too much. What it ignores is that discrimination is a question of the relative burdens imposed on in-state and out-of-state competitors, not an inquiry confined solely to any incremental alteration of an existing tax scheme. See Maryland v. Louisiana, 451 U.S. at 756. The state Supreme Court recognized this principle and applied it properly to the facts of this case. See J.S. App. 31a-35a.

The Axle Tax does not stand alone -- it is but a small part of Pennsylvania's multi-tiered scheme of taxes and fees designed to finance an

extensive highway system. See J.S. App. 2a-3a. In line with the holding in Maryland v. Louisiana, one which appellants do not question, the entire taxing scheme must be examined. Of course, appellants have made no attempt, either here or in the courts below, to demonstrate that, in the aggregate, out-of-state truckers pay more than their fair share.

Quite aside from its conflict with recent precedent, appellants' position defies logic. Can it really be true that a state, having chosen initially to place the entire burden, or a disproportionately heavy burden, of taxation on local commerce, never may adjust its scheme to take better account of the benefits received by interstate commerce? This claim is insubstantial and does not deserve this Court's attention.

b. There is not, as appellants suggest, a conflict among decisions of state high Courts sufficient to justify the Court's review. Private Truck Council of America, Inc. v. New Hampshire, No. 86-088 (August 12, 1986) and American Trucking Associations, Inc. v. Quinn, 437 A.2d 623 (Maine 1981), involved taxes imposed solely on out-of-state carriers. Here, of course, the Axle Tax applies to all vehicles. In American Trucking Associations, Inc. v. Conway, 508 A.2d 408 (Vermont 1986), the court rejected the specific argument that imposition of a flat tax and simultaneous registration fee reductions were constitutional under the complementary tax doctrine. We argue that Pennsylvania's Axle Tax and registration fees

are not complementary and this is precisely why appellants' claim must be rejected. Again, the question is whether, considering all charges, taxes and fees, the burden imposed on interstate commerce is excessive. Maryland v. Louisiana, supra. While the Vermont court may have been correct in its application of the complementary tax doctrine to the specific defense raised by the state in that case, the decision is not in conflict with reasoning employed in this case.[4]

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[4] Appellants' discussion (J.S. 21-23) of the purpose underlying Pennsylvania's vehicle registration fees and the complementary tax doctrine are difficult to understand and, in any case, irrelevant. Appellees do not contend that the Axle Tax is a compensatory tax within the meaning of this Court's holdings. The lower court's erroneous reference to that doctrine was not essential to its holding and does not

(FOOTNOTE CONTINUED ON NEXT PAGE)

2. This Court Should Not Reconsider Or Overrule Its Prior Holdings that Flat Taxes May Be Imposed On Interstate Commerce So Long As They Are Not Excessive.

Appellants' primary contention is that the Marker Fee and Axle Tax both violate the fourth prong of the Complete Auto Test -- requiring a "fair relation" between the tax collected and the services provided -- because they are flat taxes, rather than per mile charges. Far from presenting a substantial question, this argument has been rejected

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(FOOTNOTE CONTINUED)

require review by this Court. Nor is legislative intent relevant. The issue is one of effect not intent. Appellees do not, and could not, argue that good intent would save a tax scheme which in fact discriminated against interstate commerce.

by this Court in an unbroken series of decisions stretching back more than fifty years. There is no reason for this Court to reconsider, let alone overrule, that line of cases.

In Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U.S. 285 (1935)("Aero Mayflower I"), this Court upheld a flat $25 annual registration and license fee, used to support highway maintenance, imposed upon carriers using Georgia highways. In so doing, the Court observed:

> The [flat] fee is for the privilege of a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed. One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may.

Id. at 289. (citations omitted). The Court reaffirmed this principle in Aero Mayflower Transit Co. v. Board of Railroad Commissioners of Montana, 332 U.S. 495 (1947)("Aero Mayflower II") while sustaining a $15 flat tax imposed as a highway user charge.

In 1950, this Court again reaffirmed the principle that flat taxes are permissible, holding that

> complete fairness would require that a tax formula vary with every factor affecting appropriate compensation for road use. These factors . . . are so countless that we must be content with rough approximation rather than precision. Each additional factor adds to administrative burdens . . . [which we recognize] may be sufficient to justify states in ignoring such a key factor as mileage.

Capitol Greyhound Lines v. Brice, 339 U.S. 542, 546-47 (1950). Likewise, in Evansville Airport v. Delta Airlines, 405 U.S. 707 (1972), this Court again upheld a flat tax on interstate commerce. That case involved a $1 fee imposed on each passenger boarding any commercial aircraft at Evansville Airport. In upholding the fee, the court stated:

> [A] state may impose a flat fee for the privilege of using its roads, without regard to the actual use by particular vehicles, so long as the fee is not excessive.

Id. at 715. In so holding, the Court cited, inter alia, Aero Mayflower I and II, supra, and Capitol Greyhound, supra. Finally, just one year after the decision in Complete Auto, the Court explicitly reaffirmed its Evansville holding in

Massachusetts v. United States, 435 U.S. 444 (1978)(involving a "flat fee" registration tax on aircraft).

Appellants offer several reasons why this Court should overrule this line of authority. These arguments merit only brief response. First, appellants claim that modern technology renders mileage-related taxes a workable alternative to flat taxes, undermining the reasoning of the cases upholding flat taxes. This is simply not correct. Presently, only a small percentage of vehicles are required to report their mileage for the purposes of Pennsylvania taxes. By contrast, New York state, which imposes a mileage-based tax on most motor carrier vehicles, employs over 100 individuals to perform various

auditing and processing tasks in connection with that tax.[5] Thus, it would be no inconsequential task for the Commonwealth to convert all of its user charges to a per mile basis.

As this Court has observed, when a user fee is precisely calibrated to reflect actual costs, administrative expenses increase and so does the amount of revenue needed to operate the system. The resulting increase in the amount which the state may properly charge the user (in compensation for added administrative costs) may well exceed any "overcharges" to individual users which

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[5] This information is set forth in the affidavit of Joseph Reohr, Jr., an official in the New York State Department of Taxation and Finance. That affidavit was filed in support of the Commonwealth's motion for summary judgment in the Axle Tax litigation.

could occur under a flat fee approach. Massachusetts v. United States, 435 U.S. at 466.

Second, appellants contend that the Marker Fee and Axle Tax impose an excessive burden on interstate commerce because out-of-state trucks pay a much higher per mile tax than do Pennsylvania registered trucks.[6] However, this Court has never held that a difference

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[6] In support of this proposition, they cite a survey admitted into evidence in the Marker Fee litigation, but never offered or admitted in the Axle Tax case. While admitted in the Marker Fee litigation, it was not relied on by the trial court in support of its holding, and its admissibility was vigorously contested. The issue of its admissibility was never decided by the Supreme Court on appeal. In fact, the survey was blatant hearsay, consisting only of a telephone survey conducted by one of appellants' employees. In any case, as is demonstrated above, the survey is irrelevant to the issues presented by this case.

in treatment between interstate and intrastate commerce is per se unconstitutional. Nor should it. Rather, the issue is whether the tax imposed on interstate commerce is excessive in relation to the services provided. The relative burdens on interstate versus intrastate commerce are not determinative on that issue. To the contrary, as the Pennsylvania Supreme Court correctly found, neither the Marker Fee nor the Axle Tax imposed an excessive burden on interstate commerce in comparison to the services rendered by Pennsylvania to that commerce.

Third, appellants argue that flat taxes will impose an adverse cumulative burden on interstate commerce. This argument too is irrelevant. If the burden imposed is not

excessive in light of the services rendered by the taxing state, the burden is not excessive for constitutional purposes. If a motor carrier operates in a number of states and receives substantial benefits in each of them, there is nothing unconstitutional about its being required to pay reasonable taxes in each of those states. Such a burden is wholly consistent with the well-established proposition that interstate commerce may be required to "pay its own way."

Finally, appellants note that the flat taxes have provoked economic retaliation among the states. Retaliatory taxes may indeed be unconstitutional under the Commerce Clause.[7]

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[7]Pennsylvania so argued before this Court as amicus in support of Arkansas' challenge to Oklahoma's retaliatory taxes. Arkansas v. Oklahoma, No. 79 Orig. (O.T. 1984).

However, the question of retaliatory taxes bears no relationship to the legality of the original tax. Is an otherwise legal tax rendered unconstitutional because another state copies the idea? Moreover, the question of retaliation has nothing to do with the questions raised by appellants--retaliation is not limited to flat taxes or adjustments to state taxing schemes. Thus, the potential illegality of retaliatory taxes provides no support to an attack on flat taxes alone. Rather, this argument, like the others appellants make, exposes their real concern -- that they will, in fact, be required to pay their fair share. That they may be required to do so is well established and requires no further action by this Court.

CONCLUSION

The appeal should be dismissed or the decision below should be affirmed.

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